

file 5-1

Upon consideration of the parties' submissions, without oral argument, we hold that plaintiffs' claim under 35 U.S.C. § 183 is not barred by the statute of limitations. Plaintiffs' motion for partial summary judgment to that effect is therefore granted. The case is remanded to the trial division for further proceedings.

Marks v. Casey, unreported (D.D.C. August 16, 1982)

This matter is before the Court on the defendants' renewed motion for summary judgment. In the underlying cause of action, the plaintiffs, pursuant to the Freedom of Information Act (the Act), 5 U.S.C. § 552(1976), seek disclosure of sixteen documents withheld by the Central Intelligence Agency (the Agency). The documents which the plaintiffs are interested in obtaining relate to the covert recruitment by the Agency of United States and foreign students and the operational use of faculty and staff at academic institutions in the United States in such covert recruitment.

Defendants maintained the documents are exempt from disclosure under Exemption 1 of the Act—documents specifically authorized to be kept secret in the interest of national security by an executive order. Section 1-302 of Executive order 12065

provides that information may not be classified unless it is determined that unauthorized disclosure reasonably could be expected to cause at least identifiable damage to the national security. However, even if information meets this classification standard, Section 3-303 of the Executive Order provides for its release when an appropriate official of the Agency determines that the public interest in disclosure out-weighs the damage to national security that might reasonably be expected from disclosure.

The Agency maintains that the documents at issue in this action are properly classified pursuant to the Executive Order. Furthermore, an appropriate official of the Agency has determined that the public interest in disclosure of the documents is outweighed by the damage to national security which could reasonably be expected from disclosure. Affidavits have been filed detailing his analysis.

This being an action under the Freedom of Information Act, the Court has reviewed this matter *de novo* placing the burden on the Agency to sustain its action. See 5 U.S.C. § 552(a)(4)(B)(1976); *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981).

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Nevertheless, the Court must recognize that the Agency has unique insights into the potential adverse effects on the national defense and foreign policy which might be occasioned by public disclosure of particular classified records. *Military Audit Project v. Casey, supra*. As such, substantial weight is to be accorded the Agency's affidavits concerning the details of the classified status of the disputed record. . . . Summary judgment on the basis of the Agency affidavits will be warranted if the affidavits describe the documents and the justifications for non-disclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by contrary evidence of Agency bad faith.

An Agency affidavit, "accompanied by a lengthy and detailed" index, described the documents at issue and provided justifications for non-disclosure which are neither expansive nor conclusory. "These explanations plainly demonstrate that the information withheld is properly classified and falls within the claimed exemption." Further, the court reviewed each of the documents *in camera* and

concurs in the evaluation of the Agency and concludes that the substantive standards for classification have been met as to these documents and that, for the reasons stated in the Agency's affidavits, unauthorized disclosure could reasonably be expected to cause identifiable damage to national security. The Court's opportunity to review the documents *in camera* has also permitted it to conclusively rule out any suggestion that the Agency has acted in less than good faith.

The plaintiffs, however, have questioned whether the documents are indeed properly classified in view of the fact that much of the information contained therein may have already been made public as set forth in the opposition to the motion for summary judgment and the accompanying affidavit of Morton Halperin. The Court has carefully reviewed the documents *in camera* with this in mind and concludes that while useful and meaningful information of the same general topical nature may have been made public, the information in the particular documents or segments thereof at issue herein deals with specific information which has not been made public.

The court then addressed the issue of whether the Agency had properly refrained from declassifying the documents pursuant to the balancing requirements of section 3-303 of the Executive order. An Agency official had "determined that the potential damage to national security outweighed the public interest in disclosure of the information at issue." The court agreed.

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In recognizing the existence and degree of public interest, the Court's evaluation is generally on a par with that of the Agency. However, in addressing the national security aspect of the balancing equation, the Court must again recognize the Agency's unique insights into the effects of disclosure and pay due deference to them.

In the present instance, as has been previously discussed, the Agency affidavits describe the undisclosed documents and justifications for their non-disclosure with reasonably specific detail. Furthermore, the public interest in the documents is reasonably identified, discussed and considered in the affidavits. This having been done, the affidavits then demonstrate how the national security justifications for non-disclosure are logically applied to the documents at issue and why the extent of the national security concerns exceeds the interests of the public in disclosure.

More specifically, from a procedural perspective, the Agency has recognized and discussed considerations as to the public interest in disclosure including: (1) the usefulness of the information in assisting debate in Congress; (2) the necessity of the information for purposes of public debate concerning Agency activities on college campuses; and (3) the necessity of the information to academic institutions and officials in their attempts to deal intelligently with Agency activities and develop guidelines for the same. It has then weighed these considerations against well-articulated national security concerns of: (1) disclosure of intelligence sources; (2) disclosure of foreign intelligence targets and activities; and (3) specific methods utilized to recruit assets for use in operations abroad.

From a substantive perspective, the Agency has set forth a persuasive, detailed analysis of the extent of the public interest to be served by disclosure as measured against the damage to national security that might reasonably be expected. In this regard, it has pointed out that Congress, through its oversight committees, is kept fully informed of intelligence activities and is provided access to whatever information and procedures it would desire to engage in informed debate or to fashion legislation relating to activities of the Agency on college campuses. It has also argued convincingly that the general public debate and the endeavors of academic institutions to formulate policies regarding the activities of the Agency will not be significantly advanced by disclosure of the quite specific and, in some cases, somewhat dated information contained in these particular documents.

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Based upon the Agency's affidavits and its own *in camera* review, the Court is in general agreement with the substantive analysis of the Agency as to the importance of the information in these documents to the public interest in Agency activities on college campuses. While these documents might materially augment the public record, they would not do so to such a degree as to overcome the national security concerns which are at stake. This is evidenced further by the Agency's substantive analysis of the relative merits of disclosure as viewed against the articulated potential damage to national security to be reasonably expected from the same. Giving due deference to the Agency's expertise in national security matters, the Court with the benefit of its *in camera* review, is persuaded by the Agency's arguments that the qualified public interest in disclosure is outweighed by the potential damage to national security identified in the affidavits as: (1) the loss of potential sources and contacts through disclosure of personnel matters relating to recruitment of employees and agents; (2) the revelation of sensitive information concerning the mission, composition, numbers and function of employees of the Agency; (3) the providing of knowledge useful to foreign powers as to Agency methods, sources, and activities in recruitment; and (4) the loss of the trust of assets recruited on assurances of confidentiality.

Accordingly, summary judgment for the defendants.

See also *Marks v. Central Intelligence Agency*, 590 F.2d 997 (D.C. Cir. 1978) in *Guide 1978* cases.

Rothschild v. Central Intelligence Agency, unreported (D.D.C. August 24, 1982)

Upon consideration of defendant's Motion for Summary Judgment and the entire record, and upon the Court's inspection of all 107 documents in issue in this case, and it appearing to the Court that no genuine issue of material fact remains in dispute, it is by the Court, this 24th day of August 1982 hereby,

ORDERED that the defendant's motion be granted; and it is further,

ORDERED that the plaintiff's motion for Dismissal of Defendant's Motion for Summary Judgment, or, in the Alternative, an Order of Continuance to Permit Discovery is dismissed as moot; and it is further,

ORDERED that this action is dismissed, with prejudice.

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